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No.

In the Supreme Court of the United States

October Term, 1980

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW*

1. Where the jury verdict was supported by "sufficient evidence," whether the plaintiffs were erroneously and unconstitutionally deprived of a jury trial when the district court formulated its own view of the evidence and set aside the verdict because the jury's view of the evidence was inconsistent with that of the district court?

2. Whether the scope of appellate review of an order granting a new trial is the same as for review of an order denying a new trial?

3. Whether the district court acted erroneously and outside its jurisdiction in granting a new trial on grounds not stated in the defendants' new trial motion, without granting plaintiffs a hearing pursuant to F.R.Civ.P. 59(d)?

4. Whether the court of appeals committed plain error as to certain matters essential to its decision affirming the new trial order?

5. Whether the court of appeals decision is in conflict with decisions of this court and of other courts of appeals in holding that the plaintiff in a private antitrust action under Section 1 of the Sherman Act must prove actual injury to competition?

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* List of all parties to the proceeding in the Circuit Court of Appeals: the plaintiffs-appellants were Juneau Square Corp., Ralph W. Conway, Hal Bradley & Associates, Inc., Emil Bartel, Anna Bartel and Vionne Perry, as administratrix of the Estate of Thomas H. Perry. The defendants-appellees were First Wisconsin Corporation, a bank holding company, its subsidiaries First Wisconsin National Bank of Milwaukee, First Wisconsin Development Corporation and Marshall-Wisconsin Company, Inc., sometimes referred to collectively herein as the "First Wisconsin defendants", and Marshall-Michigan Company, Inc. Aetna Life Insurance Company was also a defendant-appellee but participated only in the first trial.

6. Whether the court of appeals' decision is in conflict with decisions of other circuits in holding that the use of unfair means by one major competitor to destroy another is illegal per se when done for the purpose of destroying competition?

7. Whether this court's power of supervision is called for because the court of appeals sanctioned radical departure from the accepted and usual course of judicial procedures by the district court in awarding a new trial on insubstantial and speculative grounds and through pervasive error which deprived plaintiffs of a fair hearing in the second trial?

8. Whether proof of an exact market share is necessary to establish attempt to monopolize, where direct proof exists of the defendants' possession and use of the power to fix prices or exclude competition?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 3, 1980.

REFERENCES TO OPINIONS BELOW

The opinions of the District Court appear in the appendix and are reported as follows:

A. Order granting in part and denying in part defendants' motions for directed verdict (first trial): not reported; App. 31.

B. Order granting defendants new trial: 435 F. Supp. 1307 (1977); App. 51.

C. Order denying certification for interlocutory appeal (first trial): not reported; App. 97.

D. Order granting in part and denying in part defendants' motion to dismiss for lack of standing (second trial): not reported; App. 107.

E. Order dismissing plaintiff Wil-Ten for lack of standing (second trial): not reported; App. 135.

F. Order denying plaintiffs permission to litigate certain issues or to amend pleadings (second trial): not reported; App. 136.

G. Order denying plaintiffs' motion for a new trial (second trial): 475 F. Supp. 451 (1979); App. 138.

The opinion of the Circuit Court of Appeals is reported in 624 F.2d 798 and appears at App. 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the Constitution is involved, as are Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act, the relevant portions of which are:

AMENDMENT 7

. . . [N]o fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.

SECTION 1 OF THE SHERMAN ACT

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . (15 U.S.C. §1; 26 Stat. 209; 50 Stat. 693; 69 Stat. 282; 69 Stat. 282; 88 Stat. 1708)

SECTION 2 OF THE SHERMAN ACT

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . (15 U.S.C. §2; 26 Stat. 209; 69 Stat. 282; 88 Stat. 1708)

SECTION 4 OF THE CLAYTON ACT

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. §15; 38 Stat. 731)

STATEMENT OF THE CASE

This civil antitrust action seeks recovery under Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act. The jurisdiction of the district court was based upon 28 U.S.C., §1331(a).

Juneau Square Corp. and the other plaintiffs were developers of a major office complex known as Juneau Square in the Central Business District (CBD) of Milwaukee, Wisconsin.

The gravamen of this case is the motive for and manner of the First Wisconsin defendants' elimination of competition in the office rental market in the Milwaukee CBD by agreement with one potential major competitor, Northwestern Mutual Life Insurance Company (NML), and, by concerted actions among themselves and with others, the direct destruction of their other major competitors—the plaintiffs—in taking over two existing buildings owned by the plaintiffs and preventing construction of a third building.

The First Wisconsin Corporation and NML are by far the largest financial institutions in Milwaukee. Their boards are interlocked with five common directors. They routinely acted as one another's agents in acquiring CBD real estate.

The First Wisconsin companies are the dominant owners and lessors of competitive office space in the CBD. Their new First Wisconsin Center office building, which they sought to shield from competition, brought approximately 1 million square feet of new competitive office space on the market. This was a five year supply in the Milwaukee CBD, which could absorb 200,000 square feet of new space annually.

NML also owned and operated competitive office space and owned large amounts of other developable land in the CBD. By the end of 1968 NML had obtained the lead tenant and commenced architectural work for a large office building in the CBD, next to Juneau Square. In late 1968 the First Wisconsin companies decided to build their new Center in the same area. Pursuant to a documented series of contacts between the president of First Wisconsin Corporation and the president of NML, NML agreed to shelve its own building plans, transferred its land on the block to the First Wisconsin and acted as agent in acquiring additional land for First Wisconsin's proposed building. NML deferred its own building plans for five years, which permitted the First Wisconsin to lease up its new building without competition from NML. It was agreed NML's interim space needs would be accommodated in the First Wisconsin's new building.

After the arrangements with NML, First Wisconsin's most significant remaining competition was Juneau Square. The plaintiffs had already built two office buildings in the project, Juneau Square North and South. Their proposed new Juneau Square East tower would offer 300,000 feet of first class office space with earlier occupancy, a preferabl location and an unobstructed lake view. Had Juneau Square East been completed and had the project remained in plaintiffs' hands, their ownership of 442,000 square feet would have made them the second largest office space competitor in the CBD, after the First Wisconsin companies.

Other background facts leading up to the conspiracy are summarized by the court of appeals (App. 1-4) and the district court (App. 54-56).

In March 1969 the chief real estate officer of the First Wisconsin Corporation (Holscher) and its attorney (Shute of Foley & Lardner) sent written instructions to a Chicago attorney (Shapiro) secretly to contact Aetna Life Insurance Company, which had financed the Juneau Square project from its inception and with which Juneau Square Corp. was negotiating long term financing to complete the project. This remarkable memorandum (App. 169-179) establishes the First Wisconsin's intention to take over the entire Juneau Square block; misuse of confidential credit information;[1] use of surreptitious means to contact a Juneau Square financing source and deliberate timing of that contact to kill an active financing negotiation. It also sets forth a "strategy" for a takeover that employed the leverage over the Juneau Square developers which Aetna had as mortgagee on the existing project.

Aetna denied financing to complete the project. Except for the Shute/Shapiro memorandum,[2] plaintiffs cannot document that contact was made by the First Wisconsin's agent (Shapiro) prior to the declination. Shapiro and Aetna denied contact until shortly after the declination. Apart from the question of timing, their versions of the

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[1] From the beginning the Juneau Square developers had been customers of the First Wisconsin National Bank, supplying it with detailed confidential credit information. In numerous instances the First Wisconsin's real estate department used this information in the takeover of Juneau Square.

[2] The memorandum instructed Shapiro to contact Aetna "March 10 or so." (App. 179) Aetna denied the financing by a letter dated March 11. Proof of intent to commit an act constitutes evidence the act was done. I Wigmore, Sec. 102; *Baughman* v. *Cooper-Jarrett, Inc.*, 391 F. Supp. 671 (D.C.W.D.Pa. 1975).

contact were in sharp conflict. Plaintiffs contended that regardless of what caused the declination, Aetna thereafter obstructed their attempts to obtain alternate financing.

Juneau Square Corp. first sought alternate financing from Metropolitan Life Insurance Company of New York. Negotiations were substantially complete in November 1969 when, in a sudden, unexplained about-face, Metropolitan said the deal was dead. When pressed for an explanation Metropolitan gave pro forma reasons which its Milwaukee broker testified were a sham. A First Wisconsin vice president (Liek) was in contact with Metropolitan prior to the declination. Liek claimed he was called by Metropolitan and gave it a routine credit report. Normal business practice, however, prohibits an institutional lender from seeking a credit report from a source in competition with a prospective borrower. Though he denied it, there was also evidence Liek was aware of the First Wisconsin's desire to acquire Juneau Square and Liek's denial he knew of the Metropolitan turndown was flatly contradicted by his fellow officer, Holscher. Holscher also admitted that had the Juneau Square developers obtained financing, the First Wisconsin would not have been able to take over Juneau Square.

A week after the Metropolitan declination Aetna began a mortgage foreclosure action on the existing project based on failure to keep current on real estate taxes.

Juneau Square Corp. had earlier sold a one-half interest in the completed portion of the project (Juneau Square North and South, the so-called "existing project") to defendant Marshall-Michigan. Marshall-Michigan leased its interest back to Juneau Square Corp., which remained in possession and control. As security Juneau

Square Corp. had given Marshall-Michigan a mortgage subordinate to Aetna's.

Marshall-Michigan had always cooperated with the plaintiffs toward completion of the tower office building. When Aetna commenced its action, Marshall-Michigan's principal spokesmen came from New York with a check for $245,000 to cure the default and reinstate the Aetna mortgage. However, when they arrived in Milwaukee, they first met with their attorneys (Foley & Lardner), who also represented the First Wisconsin companies, and then with Holscher of the First Wisconsin. From and after that time, Marshall-Michigan was frequently in contact with the First Wisconsin through their common lawyers and otherwise, turned uncooperative and, as confirmed by the trial court, was "doing its best to eliminate the plaintiffs" (App. 74): Marshall-Michigan did not pay the late taxes; its agent who knew most about the project and was sympathetic to the plaintiffs was fired after 21 years service without explanation; Foley & Lardner on Marshall-Michigan's behalf attempted to pressure the plaintiffs into giving up possession of the project and, without court authorization or warning, sent a letter to the Juneau Square tenants telling them not to pay urgently needed rents to Juneau Square Corp. Shortly after First Wisconsin's executive committee determined to acquire Juneau Square, Marshall-Michigan secretly agreed with Aetna to foreclose its second mortgage, acquire the project and then reinstate the Aetna mortgage.[3] Marshall-Michigan started foreclosure pursuant to this arrangement and sought to have a receiver appointed.

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[3] It later combined this with a sale of its interest in Juneau Square to the First Wisconsin. By this mechanism the First Wisconsin defendants ultimately obtained Juneau Square.

Defendants contended the meeting between the First Wisconsin representatives and Marshall-Michigan preceding these acts was inconclusive and led to nothing. However the evidence established repeated contacts thereafter between Marshall-Michigan and the First Wisconsin, participation by the First Wisconsin in Marshall-Michigan's dealings with Aetna, common attorneys between Marshall-Michigan and the First Wisconsin and a formal decision by the First Wisconsin Corporation's board of directors at its next annual meeting authorizing the acquisition of Juneau Square with special provision to keep the identity of the proposed acquisition secret.

The Milwaukee County circuit judge in the foreclosure action found Marshall-Michigan's letter to tenants to be a wrongful act. He denied Marshall-Michigan's motion for a receiver, leaving Juneau Square Corp. in possession. Aetna and Marshall-Michigan then stipulated to permit construction of the Juneau Square East tower, dismiss their actions and reinstate the Aetna mortgage provided Juneau Square Corp. obtained long term financing by September 30, 1970. In exchange, Juneau Square Corp. waived its foreclosure defenses, counterclaims and right of redemption, so that judgment could be entered if it failed to obtain a financing commitment by the deadline. Juneau Square Corp. did receive a financing commitment but not until shortly after the stipulated deadline had passed. Because Aetna refused to extend the deadline, this financing expired. When it attempted to enter its foreclosure judgment, Aetna met resistance from the judge, who said Juneau Square Corp. could litigate its defenses and counterclaim. Aetna and Marshall-Michigan then agreed to a second stipulation, similar to the first, with a deadline of December 31, 1971.

By May 1971 Juneau Square Corp. negotiated a $14.5 million financing package from New York Life Insurance Company (NYL). NYL's Chicago office forwarded the

financing application to the New York headquarters with a favorable recommendation. At its May 5, 1971 meeting NYL's Mortgage Loan Committee requested certain changes in the structure of the loan package.

First Wisconsin had a friend at NYL (Duncan) who served on this committee. Aware of the First Wisconsin's building development next door to Juneau Square, he asked if he could do some further "credit checking" on the Juneau Square developers. He says within the next day or two he telephoned one Albert Little, a vice president of the First Wisconsin.

Meanwhile, on May 4, 1971 the *lawyers for the First Wisconsin and Marshall-Michigan* had sent a status report on Juneau Square to *Holscher* (the First Wisconsin official in charge of the Juneau Square take over), which on May 6, 1971 Holscher forwarded to the *president* of the First Wisconsin Corporation *and to Little.* (App. 195-7) Little's only connection with Juneau Square at this time was his conveyance to NYL of the credit report referred to below. These lawyers and First Wisconsin officials never explained their joint interest and activity at this time and in these circumstances.

NYL's proposed changes were agreed to by the Juneau Square developers and the NYL field man told them "they had a deal" and that it was "all set". This was confirmed by a contemporaneous letter of the mortgage loan broker. The NYL field man forwarded the application to the home office with a memorandum stating:

> "In summary, we are offered a building with an ideal view overlooking Milwaukee Harbor surrounded by quality type anchored establishments, immediate access to the metropolitan freeway system and a very strong office market in which the subject has already enjoyed a successful penetration. The sponsorship

presently has the necessary balance between expertise and capital to see the project through to successful completion."

Meanwhile, Little of the First Wisconsin gave Duncan of NYL a credit report which painted a very unfavorable picture of another Milwaukee Bank which was participating in the development and accused the Juneau Square developers of mishandling funds on the project. As confirmed by the trial court, that accusation was false.[4]

The Juneau Square financing package was presented to the NYL loan committee for final approval May 19, 1971. NYL declined the loan. A memorandum from NYL's files quotes the NYL committee chairman (Lutz) as specifying the plaintiffs' mishandling of funds and the alleged weakness of the Midland Bank as the reasons for declining the loan (App. 180). Lutz testified this data came from the report given by Little of the First Wisconsin (App. 181-2), although Duncan had not revealed the source of the report to the committee at the May 19th meeting.

When he later learned the First Wisconsin might have been the source for the credit report, Lutz sent a memorandum to his NYL associate, Duncan, chastising him for seeking a report from a prejudiced source and pointing out that the First Wisconsin had ". . . a definite conflict of interest in reporting on their competitor's efforts in building a structure across the street from their proposed building that will come on the leasing market at least a year or more ahead of their building" (App. 185).

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[4] The First Wisconsin originally denied having any contact with New York Life. When the contact was proved by documents discovered in this action, the First Wisconsin gave numerous conflicting explanations to justify the accusation. Each such explanation proved to be untrue and fabricated. See district court's opinion App. 84.

Efforts to revive the NYL financing, eliminating the plaintiffs as developers to remove the stigma created by the First Wisconsin's credit report, proved not feasible.

Juneau Square Corp. thereupon sought financing from a new source, Baird & Warner Real Estate Investment Trust. By mid December 1971 Baird & Warner tentatively agreed to make an equity investment in the project. On December 20, less than two weeks before the stipulated deadline, representatives of Aetna, Baird & Warner, and Juneau Square met to discuss the new financing arrangement. Aetna was willing to withhold entry of the foreclosure judgment provided Marshall-Michigan also did so. Marshall-Michigan initially agreed but following contact from Holscher of the First Wisconsin reneged and entered judgment on January 3, 1972. Aetna followed suit on January 4. The entry of those judgments extinguished any hope that Baird & Warner would finance East.

Marshall-Michigan then purchased the existing project for a nominal amount at the sheriff's sale, subject to Aetna's mortgage. Marshall-Michigan then sold its interest to the defendant Marshall-Wisconsin, a new First Wisconsin subsidiary.[5] Marshall-Wisconsin then secretly agreed with Aetna on a new mortgage arrangement, leaving the First Wisconsin subsidiary, Marshall-Wisconsin, with ownership of the existing project in Juneau Square.

Juneau Square Corp. and investors allied with it still controlled about ¼ of the Juneau Square block—the part not yet developed.[6]. It tried to develop a reduced version

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[5] Marshall-Wisconsin (First Wisconsin) and Marshall-Michigan also had a secret side agreement that if a court should enjoin this sale, they would circumvent the injunction by converting the sale of assets into a sale of stock.

[6] This had not been subject to the Aetna and Marshall-Michigan mortgages. See App. 201.

of the Juneau Square East tower building in this area but could not get financing because of the foreclosure judgments entered against it of over $5 million. The agreement between Aetna and Marshall-Wisconsin (First Wisconsin) described above had provided that their mortgage arrangement would remain unrecorded until the First Wisconsin completed ouster of the Juneau Square developers. This agreement kept Aetna's $5 million deficiency judgment of record, so that Juneau Square Corp. could not obtain credit.

Holscher and Foley & Lardner on behalf of the First Wisconsin then approached Juneau Square Corp.'s president and its lawyer, and offered to relieve them of personal guarantees on a Juneau Square note to the First Wisconsin National Bank, provided they help First Wisconsin acquire the remaining interests in the Juneau Square block held by the lawyer's clients. The lawyer refused, as did Juneau Square Corp.'s president.

The First Wisconsin then purchased some mortgages on the remaining portion of the block and foreclosed, eliminating any further possibility of development. Juneau Square Corp. and its associates thus lost their project and were left heavily in debt. The First Wisconsin companies, on the other hand, were able to develop their office building free of significant competition and lease it at record high rents. The trial court held that competition from Juneau Square East would undoubtedly have altered the First Wisconsin's ability to charge those high rents (App. 72, 80), and that the evidence entitled the jury to find "... that as a result of the elimination of the plaintiffs and the interference with free and open competition, the defendants were able to charge higher rates for the rental of their office space." (App. 80)

At the close of plaintiffs' case in the first trial the court directed a verdict against plaintiffs on their claims under

Section 2 of the Sherman Act and Section 7 of the Clayton Act.[7] The jury returned a verdict finding all defendants except Aetna[8] had conspired to restrain trade unreasonably in the leasing, development, construction, and financing of rental office space in the Milwaukee CBD in violation of Section 1 of the Sherman Act, and awarding damages of $6 million. After trebling and set-off, the court entered judgment for plaintiffs in the amount of $16.5 million.

Defendants, except Aetna, then moved for judgment notwithstanding the verdict or a new trial on all claims. The court granted judgment notwithstanding the verdict on the interstate financing portion of plaintiffs' Sherman Act claims and ordered a new trial on the other claims against each defendant except Aetna (App. 51).[9] The court refused plaintiffs' request for certification of an interlocutory appeal of the new trial order pursuant to 28 U.S.C. § 1292(b). The Court of Appeals then dismissed an attempted appeal by plaintiffs for lack of jurisdiction.

In the second trial much of the same evidence was presented, but with certain important differences in evidentiary and procedural rulings and in the court's instructions:

(a) The plaintiffs were not allowed to cross-examine NYL witnesses with contemporaneous NYL business records to establish that the First Wisconsin's charge of diversion of construction funds was the main cause of NYL's refusal to lend.

(b) Albert Little, who had made the credit report to New York Life, was the only live witness called by the

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[7] Plaintiffs did not appeal the dismissal of their §7 claim.

[8] Aetna's main line of defense had been that it did not *consciously* participate in a conspiracy to restrain trade.

[9] The court denied plaintiffs' motion for a new trial on its claims against Aetna. App. 92-93.

defendants to testify the diversion charge was true. His cross-examination was terminated after a few minutes, at day's end, without effective opportunity to challenge the diversion charge. The court then quashed a subpoena served on Little to return the next day to complete his cross-examination on the grounds the witness would be inconvenienced and uncertainty the witness was subject to subpoena, being a Florida resident (but served right in the courtroom).

(c) The court allowed defendants to edit, shift and exclude deposition testimony of the First Wisconsin official in charge of the Juneau Square credit file during the time the alleged diversion of construction funds referred to in the credit report to NYL supposedly occurred, so as to eliminate contradictions and remove any effective method of demonstrating the invalidity of the witness's several different attempted justifications of the diversion charge.

(d) Deposition testimony by officials of the defendant Marshall-Michigan offered by the plaintiffs at the second trial was severely restricted, as was cross-examination of the witnesses who testified live in behalf of Marshall-Michigan.

(e) Agents of NYL, Baird & Warner and other financing sources were not permitted to quote the reasons they gave the plaintiffs for refusals to finance Juneau Square East. Similarly the principal broker involved in the Metropolitan Life financing (Warren Stringer) was precluded from commenting on the lack of common sense from the business point of view of the reasons given by Metropolitan for its refusal to finance.

(f) The evidence of the total real estate holdings of the First Wisconsin companies and NML in the CBD, offered to show their respective positions in and dominance of the market, was excluded.

(g) Without the required notice to counsel, the court instructed the jury plaintiffs must prove actual injury to competition.

(h) The court declined to give instructions requested by plaintiffs regarding the illegality of certain acts done by defendants and instead instructed that any such illegality is irrelevant.

i) The court again declined to instruct that defendants' conduct could be a per se violation of §1 of the Sherman Act.

(k) The court instructed that Aetna could not be found to be a co-conspirator and forbade plaintiffs to attempt to prove or argue that Aetna's actions had been at least controlled or manipulated by the other defendants.

(l) At the close of the case the court also struck all evidence and precluded any claim in argument tending to show Aetna's March 11, 1969 refusal to finance Juneau Square East was due to any conspiracy among the other defendants.

(m) Consistently throughout the second trial, the court applied strict standards to the plaintiffs but very liberal standards to the defendants in such matters as the scope and vigor of cross-examination permitted, the foundation required for business records, and the imposition of time limits for questioning witnesses and for jury argument. The court also permitted two defense counsel to cross-examine one of plaintiffs' principal witnesses in shifts and permitted the presentation of plaintiffs' direct case to be interrupted for long periods of alleged "voir dire" of witnesses.

The second trial concluded on June 19, 1978 with a jury verdict for defendants on all issues. Plaintiffs moved for a new trial, which the district court denied. Plaintiffs then appealed to the Circuit Court of Appeals for the Seventh Circuit which affirmed the trial court in all respects.

ARGUMENT

I.

THE NEW TRIAL ORDER OF THE DISTRICT COURT AND ITS AFFIRMANCE BY THE COURT OF APPEALS RESULTED FROM A SERIES OF FUNDAMENTAL ERRORS WHICH DESERVE REVIEW BY THIS COURT.

A. The district court applied an erroneous and unconstitutional "weight of the evidence" standard in setting aside the first verdict.

This Court has not yet defined the "weight of the evidence" standard for deciding a motion for a new trial. The conflict among the circuits as to this standard is described in 11 Wright & Miller, Federal Practice and Procedure, §2806, p. 42:

> The power of a federal judge to grant a new trial on the ground that the verdict was against the weight of the evidence is clear. The standard that is to control in passing on motions of this kind is not.

Notwithstanding uncertainty on the standard, there is general condemnation of what the district court here did: substitution of its view of the evidence for that of the jury.

In its new trial decision (App. 51), the district court omitted much important evidence, mistook other evidence, and accepted testimony from defense witnesses the jury had every right to disbelieve. When plaintiffs cited these errors in their application for an interlocutory appeal under 28 U.S.C. 1292(b), the district court responded (App. 102):

> The Court's prior opinion *adopts a view of the case based on the evidence presented at trial.* The plaintiffs have not argued to the contrary.[10] The fact that the plaintiffs do not agree with the characterization or that the jury *was not required to adopt it* cannot serve as a basis for this Court to certify its order for appeal. (Emphasis added.)

The Court went on to say (App. 103):

> As to the view of the evidence adopted by the Court, it is supported by substantial evidence in the record.

The Seventh Amendment prohibits re-examination of any "fact tried by a jury . . . (other) than according to the rules of the common law." A trial judge should not interfere with the verdict unless the jury has reached a seriously erroneous result. 6A Moore's *Federal Practice,* para. 59.08(5) at 59-160; 11 Wright & Miller, *Federal Procedure and Practice,* Sec. 2806 at 49. A jury verdict should not be set aside if it is one which could reasonably have been reached or unless it is "clearly, decidedly, and overwhelmingly against the weight of the evidence." *Schybinger* v. *Interlake Steamship Company,* 273 F.2d 307, 312 (7 Cir. 1959); *Duncan* v. *Duncan,* 377 F.2d 49, 52 (6 Cir. 1967); *Champion Home Builders* v. *Shumate,* 388 F.2d 806, 808 (10 Cir. 1967).

The district court here found:

> . . . the Court has carefully weighed the evidence and is of the opinion that there is sufficient evidence to support the finding of the jury [that the conspiracy existed]. (App. 72).

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[10] Plaintiffs' 1292(b) brief having argued strongly against the view of the evidence taken by the trial court, we do not understand the court making this statement.

Instead of honoring the jury's finding, the court substituted its own view of the evidence and decided that since its view was "based on evidence presented at the trial" and since the jury's verdict was inconsistent with the court's view, the verdict was set aside. This was an erroneous and unconstitutional misapplication of the "weight of the evidence" doctrine. *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944) states:

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

It is beside the point that the trial court's view may be "supported by substantial evidence." It is the jury's view that prevails where, as here, it is supported by the evidence.

B. The court of appeals failed to review the district court's "weight of the evidence" test and improper use of a supposed instructural error as grounds for the new trial.[11]

The court of appeals relied on an amalgam of the district court's "weight of the evidence" analysis and hearsay rulings to affirm the new trial order. It failed entirely to consider whether, in ordering a new trial, the district court acted under compulsion of an improper "weight of the evidence" test, which is as reviewable as any other legal error. 6A Moore Federal Practice §59.08 [5] at 59-154. The implicit sanctioning of the district court's erroneous weight of the evidence test conflicts with the Seventh

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[11] These questions were specifically presented and briefed in the court below. App. 253-289.

Circuit's own earlier decisions as well as those of most other circuits. *Durant* v. *Surety Homes Corp.*, 582 F.2d 1081, 1087 (7th Cir. 1978), and *Schybinger, Duncan* and *Champion Home Builders, supra.*

Similarly the court of appeals sanctioned the district court's violation of F.R.Civ.P. 59(d). The district court held a supposed failure correctly to instruct on public injury ". . . was taken into consideration in ruling on the motions for a new trial." (App. 80, n. 16) In fact, the instruction given was what defendants requested, there was no request to satisfy F.R.Civ.P. Rule 51, and the supposed error was not included in the defendants' ground for a new trial. At a *minimum,* therefore, the trial court was required by F.R.Civ.P. 59(d) to give plaintiffs a hearing before granting a new trial, which it did not do, so that the new trial order was jurisdictionally invalid. *Lapiczak* v. *Zaist,* 451 F.2d 79, 80 (2 Cir. 1971) and *United States* v. *Robinson,* 361 U.S. 220, 229 (1960).

C. The scope of appellate review for an order granting a new trial should be broader than the scope of review for an order denying a new trial.

This Court has not yet decided whether the scope of appellate review for an order granting a new trial should be the same as for review of an order denying a new trial. The distinction is forcefully set forth in *Massey* v. *Gulf Oil Corporation,* 508 F.2d 92, 94-95 (5th Cir. 1975):

> Our review of an order granting a motion for new trial is somewhat broader than review of an order denying a motion for new trial.
>
> • • •
>
> We noted that where the judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's

> ruling undisturbed. But where the judge has granted a new trial the factors oppose each other. Deference to the trial judge is subjected to opposing tensions of deference to the jury as the body to whom fact finding is constitutionally allocated and deference to the decision which the jury has reached pursuant to that authority. Furthermore, where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial, because to an extent the judge has substituted his judgment of the facts and credibility of witnesses for that of the jury. Thereby we protect the litigants' right to jury trial.

The Seventh Circuit made no such distinction. It described its review as "exceedingly limited" because of the trial court's "broad discretion," relying on three cases affirming *denials* of new trial motions (App. 13).

By erroneously applying to grants of a new trial the same scope of appellate review as denials of a new trial, the Seventh Circuit put itself in conflict not only with the Fifth Circuit (*Massey*), but also with an authority cited earlier in its own decision. 11 Wright & Miller, Id., §2819.

D. The court of appeals decision contains numerous clear errors on matters essential to its result.

The court of appeals affirmance of the new trial order rests upon two hearsay rulings which, though "hardly sufficient" to warrant a new trial standing alone (App. 19), became prejudicial because the hearsay (some Moertl testimony and a Lutz memorandum) was supposedly "the only evidence of the causal relationship" between Little's credit report and New York Life's declination of financing. (App. 20)

The court plainly erred. Plaintiffs' *principal* evidence of causation was *another* contemporaneous memorandum (App. 180) and related Lutz testimony (App. 181-2), properly in evidence and clearly establishing the reason for the NYL declination was the data set forth in the Little credit report.[12] There was extensive additional evidence showing the causal relationship, summarized at (App. .....).

It was also clear error to hold that ". . . plaintiffs' theory . . . reduced itself to reliance upon the [Little/NYL sequence]." There were *seven* financing negotiations interfered with by the First Wisconsin: Aetna, Metropolitan, Marshall-Michigan, Diversified, New York Life, Baird & Warner REIT and Northwestern Elevator Co. (App. 261-289). In one case (Marshall-Michigan) the direct product of the First Wisconsin's contact was the continuation of Aetna's foreclosure action and the commencement of Marshall-Michigan's foreclosure action. This self-evidently impaired Juneau Square Corp.'s ability to obtain financing.

Finally the abundant evidence of the First Wisconsin's conspiratorial pattern of behavior and motive to interfere with financing meant the plaintiffs had only to establish opportunity (i.e., the fact of contact) to make their case. *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *United States* v. *Grzywacz*, 603 F.2d 688 (7th Cir. 1979); *Poller* v. *Columbia Broadcasting*

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[12] The court's reference to the "alleged" impropriety of the Little credit report (App. 19) suggests it overlooked the fact that the report's central accusation (that the Juneau Square Developers had misused construction funds) was shown by the overwhelming weight of the evidence to be a slander. See trial court's opinion at App. 84. The court of appeals' description of the report leaves out that central accusation (App. 9-10), despite the fact that most of the First Wisconsin's defense was a futile attempt to justify the accusation.

System, Inc., 396 U.S. 464, 473 (1962); *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208 (1939).

This Court should therefore review the trial court's new trial order and the court of appeals' affirmance thereof.

II.

THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS IN HOLDING THAT THE PLAINTIFF IN A PRIVATE ANTITRUST ACTION UNDER SECTION 1 OF THE SHERMAN ACT MUST PROVE ACTUAL INJURY TO COMPETITION.

Over plaintiffs' objection the district court instructed the jury in the second trial:

> The antitrust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition in the leasing of office rental space in the central business district of the City of Milwaukee. (App. 23).

The court of appeals held such instruction was proper. (App. 23-24).

The instruction is contrary to this Court's decisions in *Radiant Burners, Inc.* v. *People's Gas Light & Coke Co.*, 364 U.S. 656 (1961), *In re McConnell*, 370 U.S. 230 (1962) and in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). It is also contrary to the decision of the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse*, 295 F.2d 269, 276-277 (2 Cir. 1961), and to an earlier Seventh Circuit case, *Switzer Brothers, Inc.* v. *Locklin*, 297 F.2d 39, 47 (7 Cir. 1961), *cert. den.* 369 U.S. 851 (1962).

The court below attempted to limit these cases to per se violations. (App. 24). No such limitation is found in the decisions of this Court. *Radiant Burners* states at 660:

> Therefore, to state a claim upon which relief can be granted under that section (Sec. 1 of the Sherman Act), allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

In re McConnell held at 231, " . . . the right of recovery of a plaintiff in a treble damage antitrust case does not depend on proving an economic injury to the public."

Assuming application of the rule of reason were proper, the district court correctly instructed plaintiffs must show an unreasonable restraint of trade, defined as one which "tends or is reasonably calculated to prejudice the public interest" in free and open competition. (App. 22-23).

The Court of Appeals unfairly and inaccurately treated this language as "clarifying" the method by which plaintiffs might meet their burden of proving actual injury to competition. (App. 22). Not only is there no such burden; the instruction did not say or imply that the burden to prove actual injury to competition is satisfied by proof of an unreasonable tendency or purpose to impair competition.

The Court of Appeals' attempted rationalization, coupled with its suggestion that had the instruction not been "clarified" it might have reversed (App. 22), emphasize the confusion and uncertainty in this area that call for review by this Court.

III.

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS IN HOLDING THAT THE USE OF UNFAIR MEANS BY ONE MAJOR COMPETITOR TO DESTROY ANOTHER IS ILLEGAL PER SE WHEN DONE FOR THE PURPOSE OF DESTROYING COMPETITION.

The First Wisconsin defendants were the largest owners and operators of rental office space in the Milwaukee CBD. The plaintiffs' Juneau Square project, if completed, would have been the second largest. The Court of Appeals noted the probable effect the completion of the plaintiffs' office project would have had upon the defendants own development plans and concluded, "This obvious competitive pressure is the setting for plaintiffs' antitrust claims." (App. 4). Defendants aimed to and did destroy the plaintiffs by direct and improper means, primarily through interference with financing plaintiffs needed to survive.

The Court of Appeals inaccurately perceived the plaintiffs' request that the jury be given the option to find a per se violation as an attempt to incorporate the general law of unfair competition. (App. 27-28). However, this case does not involve "unfair competition" in the usual sense. Defendants weren't trying to unfairly compete with the plaintiffs. They were trying to remove them from the market so they wouldn't have to compete with them.

The classic description of per se violations of Section 1 of the Sherman Act describes the defendants' conduct here:

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they

> have caused or the business exuse for their use. *Northern Pac. R. Co.* v. *United States*, 356 1, 5 (1958).

Application of the per se rule here is reinforced by *United States* v. *General Motors*, 384 U.S. 127, 148 (1966):

> The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

In no circumstances can a direct attack by one major competitor upon another resulting of the loss of a substantial participant in the market be anything but an unreasonable restraint of trade.

The First Circuit follows the rule that use of unfair means by one major competitor to destroy another is illegal per se under Section 1 of the Sherman Act. *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879, 884 (1 Cir. 1960); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 562 (1 Cir. 1974). The Tenth Circuit appears to agree. *Craig* v. *Sun Oil Company of Pennsylvania*, 515 F.2d 221, 224 (10 Cir. 1975); *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co.*, 353 F.2d 618 (10 Cir. 1965), cert. denied 383 U.S. 945 (1966). The contrary position has been taken in the Fifth Circuit. See *Northwest Power Products, Inc.* v. *Omark Industries*, 576 F.2d 83, 90 (5 Cir. 1978).

Defendants here engaged in a restraint of trade far more vicious and direct in its anti-competitive effect than price fixing, group boycotts, territorial divisions or tying arrangements, and do not deserve the benefit of the rule

of reason. So long as the conduct is not divorced from an anticompetitive purpose, it is clearly appropriate for per se treatment.

IV.

THIS COURT'S POWER OF SUPERVISION IS CALLED FOR BECAUSE THE COURT OF APPEALS SANCTIONED RADICAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES BY THE DISTRICT COURT IN AWARDING A NEW TRIAL ON INSUBSTANTIAL AND SPECULATIVE GROUNDS AND THROUGH PERVASIVE ERROR WHICH DEPRIVED PLAINTIFF OF A FAIR HEARING IN THE SECOND TRIAL.

In addition to the grounds already discussed the trial court set aside the first verdict on the speculative grounds that: (a) the jury *may* have been influenced by an alleged "imbalance of time" in the presentation of the plaintiffs' and defendants' cases (defendants made no record of possible prejudice) (App. 89); (b) the jury *may* have been confused by the complexity of the evidence (there is no record such confusion existed) (App. 90); (c) the jury *may* have duplicated damages among the several plaintiffs (damages were waived by all plaintiffs but one to avoid this) (App. 90-91); (d) "possible" (but not *found*) jury misconduct (App. 92); and (e) that the jury *may* have been influenced by "colorful" jury argument (App. 92).

As is apparent, these factors were based on unfounded speculation. This Court held in *Opper* v. *United States*, 348 U.S. 84, 95 (1954):

> "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of the jury to follow instructions."

The Court of Appeals should not be permitted to sanction the use of such ephemeral and speculative grounds to set aside a jury verdict, particularly after so protracted and expensive a trial. To do so is not only grossly unfair to the parties but imposes needless burdens on the judicial system. This Court's supervisory power should be brought to bear to prevent this from recurring.

In the second trial the district court engaged in numerous serious departures from proper judicial procedures which the Court of Appeals brushed aside without explanation as lacking merit. (App. 30). The departures were of fundamental importance and prevented the plaintiffs from having a fair trial. They included (a) deprivation of the right to cross-examine a key defense witness (Albert Little) on a key issue in the case (the falsity of his credit report to New York Life) by quashing without cause a subpoena served upon the witness to permit cross examination (See details at App. .....); (b) permitting arbitrary and misleading editing and rearrangment of deposition testimony (App. .....); (c) permitting lengthy interruption of plaintiffs' case by allowing defendants to conduct nearly four days of alleged "voir dire" of witnesses (App. .....); and (d) markedly uneven and unfair application of evidentiary and time restrictions on plaintiffs as compared with defendants (App. .....). See generally App. ..... to .....

The district court also declined to instruct as to the legality of various acts of the defendants, to be considered on the issues of motive, intent and reasonableness if the jury found they were done as part of a conspiracy to restrain trade. See *Utah Pie Co.* v. *Continental Baking*, 386 U.S. 685, 696-7 (1967); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). The district court thus failed in its fundamental duty to tell the jury what is legally improper so that it could weigh the conduct in question on the relevant issues.

The cumulative effect of these procedural aberrations, which the court of appeals has sanctioned, clearly caused a miscarriage of justice in the second trial. They too call for this court's supervisory attention, lest such practices erode the possibility of a fair trial.

V.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT IN REQUIRING PLAINTIFFS TO ESTABLISH DEFENDANTS' EXACT MARKET SHARE TO AVOID A DIRECTED VERDICT ON THE ISSUE OF ATTEMPT TO MONOPOLIZE EVEN THOUGH THERE WAS DIRECT EVIDENCE FOUND BY THE TRIAL COURT FROM WHICH THE JURY COULD FIND THE DEFENDANTS HAD AND WERE EXERCISING POWER TO FIX PRICES OR EXCLUDE COMPETITION.

The district court granted a directed verdict against plaintiffs on the issue of attempt to monopolize. (App. 31). The court of appeals affirmed on the ground plaintiffs had failed to establish defendants' market share. (App. 30).

This Court rejected the "numbers approach" to determination of monopoly power in *United States* v. *Columbia Steel Co.*, 344 U.S. 495, 527-528 (1948).

Plaintiffs did in fact introduce substantial statistical evidence of defendants' market power (about 70% of the market), summarized at App. ..... More important, plaintiffs introduced more direct evidence of monopoly power: proof that defendants were in fact fixing prices and excluding competition in the market. The trial court acknowledged monopoly power can be proved by such direct evidence and that only when such direct evidence is lacking is the thorough economic evaluation and weighing of relative market strengths called for. (App. 45.) The trial court then became confused, however, and rejected plaintiffs' claim for failure to make the full economic evalua-

tion even though it had in effect found there was direct evidence of monopoly power: ". . . that as a result of the elimination of the plaintiffs and the interference with free and open competition, the defendants were able to charge higher rates for the rental of their office space" (App. 80) and that competition from Juneau Square would undoubtedly have altered First Wisconsin's ability to charge those high rents. (App. 72, 80.)

In *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7 Cir. 1971), *cert. denied* 405 U.S. 1066 (1972), the court said:

> [W]e do not understand the "dangerous probability" test to involve an evaluation of the actual likelihood that an attempt would have succeeded. . . . Rather, it requires an *appraisal of the alleged offender's ability to achieve the forbidden result,* his intent, and the nature of his overt actions. . . . The ultimate concern is the firm's actual or threatened impact on competition in the relevant market. (Emphasis supplied.)

In this case, the district court found, in effect, that there was evidence from which the jury could find that defendants were in fact in the very process of achieving the forbidden result, thus clearly demonstrating at least a dangerous probability of success. It was thus a plain violation of this Court's ruling in *Columbia Steel* to take this issue from the jury for want of secondary evidence of defendants' power.

CONCLUSION

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals for the reasons given in this petition.

Respectfully submitted,

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